

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

MEMORANDUM & ORDER

v.

03-CR-929 (NGG)

VINCENT BASCIANO, and
PATRICK DEFILIPPO,

Defendants.

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GARAUFIS, United States District Judge.

Vincent Basciano (“Basciano”) and Patrick DeFilippo (“DeFilippo”) (together “Defendants”) have requested a missing witness charge as to Joseph Massino. (DeFilippo Ltr dated April 10, 2006.) The United States (“Government”) has opposed this request, but asked for an equal availability charge. (Gov’t Requests to Charge, dated Apr. 10, 2006 at 134.) Both requests are denied.

In this case, Joseph Massino is not equally available to both sides, pursuant to United States v. Caccia, 122 F.3d 136, 139 (finding that physical availability was not sufficient to show equal availability), as DeFilippo’s attempts to interview Massino have been rejected. Nonetheless, Joseph Massino is not missing or unavailable because the Government has proffered that it will produce Massino if subpoenaed. Furthermore, the defense has Massino’s Rule 3500 material. See United States v. Abellis, 146 F.3d 73, 84 (2d Cir. 1998) (finding no error for trial judge to not give missing witness instruction where witness was willing to testify, although unwilling to be interviewed, the government provided defendants with F.B.I. records and other materials, and defense counsel was permitted to argue the issue to the jury.) As advised by the Second Circuit, I will not charge the jury at all on this subject, instead allowing

parties to raise it in their arguments. Caccia, 122 F.3d at 139-40 (finding that an equal availability charge was “ill-advised” where witness only physically available to defense); United States v. Torres, 845 F.2d 1165, 1169 (2d Cir. 1988) (if a witness is equally available to both sides, no instruction is necessary, particularly where the unpresented testimony would be merely cumulative.)

Both Defendants’ and the Government’s requests for a jury charge on the availability of Joseph Massino are DENIED.

SO ORDERED.

Dated: April 17, 2006
Brooklyn, N.Y.

/s/
Nicholas G. Garaufis
United States District Judge